INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	14

CITATIONS

Cases:

Hoffa v. *United States*, 385 U.S. 293	7
Massiah v. *United States*, 377 U.S. 201	7
Napue v. *Illinois*, 360 U.S. 264	9

Statute and rules:

18 U.S.C. 3432	8
Rule 33, F.R. Crim. P.	13

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 505

ROBERT WOLCOFF, SANFORD BURTON WOLCOFF, PAT MANNO, and LARRY FREEDMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 379 F. 2d 521.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1967. A petition for rehearing was denied on July 19, 1967. The petition for a writ of

certiorari was filed on August 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a mistrial should have been granted or a hearing held because of the government's severance of a co-defendant, just before the trial commenced, so that he could testify against petitioners.

2. Whether the government was required to disclose to petitioners prior to trial the fact that a co-defendant charged in the indictment had indicated his intention to testify for the government.

3. Whether a severance should have been granted to one of the petitioners.

4. Whether a hearing should have been ordered by the court of appeals on allegations made for the first time in that court that the government misrepresented to defense counsel that a potential defense character witness was hostile to petitioners and did not wish to see them.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to commit mail fraud and to violate the bankruptcy laws and on ten substantive counts charging such violations. On March 25, 1966, petitioner Freedman was given a suspended sentence and placed on probation for three years on condition that he spend the first ninety days

in a jail type institution; petitioner Manno was sentenced to two years' imprisonment on each count, the sentences to run concurrently; and petitioners Robert Wolcoff and Sanford Burton Wolcoff were sentenced to five years' imprisonment on each count, the sentences to run concurrently.

The evidence, which is not in dispute, showed that in October 1962, petitioners Manno and Burton Wolcoff determined to enter the business of selling premiums, "merchandise used by businesses as gifts to employees . . . and as inducements to prospective customers" (Pet. App. 2, ft. 1). Hartman (a co-defendant who testified for the government) was hired as a buyer and salesman for their company, Catalog Premium Specialties (Tr. 106, 109-113).[1] His duties included telephoning manufacturers, wholesalers and factory representatives and placing orders, limited to $50, for merchandise. When Hartman asked the reason for the $50 limitation, he was told by Burton Wolcoff that "if we have to scam we have got to have small bills because the creditors won't come after us on a scam for small bills, but they would for big ones" (Tr. 114-115, 117). The word "scam" was explained to Hartman by Wolcoff as the buying of goods on credit, not paying for them, and causing a "phony bankruptcy" to "beat the creditors out of the money" (Tr. 118-119).

In early November 1962, John Lorusso (a convicted co-defendant who did not appeal) and Robert

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which we are lodging with the Clerk of this Court.

Wolcoff came to the Catalog office and indicated that they were starting a new company in Berwyn, Illinois called Fiesta Warehouse Center (Tr. 121). They asked for a list of suppliers who had extended credit to Catalog, and for a list of creditors of a company named the House of Carpets which they said they had just scammed (Tr. 122). Petitioners determined to move all of Catalog's goods to Fiesta and instead of having two little scams to "have one big scam" (Tr. 129-130).

Shortly after the move to Fiesta, a meeting was held at the Fiesta premises among all the petitioners, Lorusso and Hartman. Burton Wolcoff assigned the others their functions, explaining that he and his brother would have to remain in the background because they had just scammed the House of Carpets and might be known to salesmen. Hartman and Freedman were to do the buying; Lorusso was to manage the store; and Manno was to be present in case "any trouble" developed (Tr. 139-143). Large companies such as General Electric were to be paid so that Fiesta could use them as credit references. With smaller companies, Fiesta would order a small quantity of merchandise and pay for it, then reorder double the amount and fail to pay (Tr. 208-212). Goods thus obtained would be sold and the money siphoned out of Fiesta's checking account to the various conspirators (Tr. 205, 212). The scheme was put into operation and functioned for several months. Eventually a creditor caused an involuntary petition in bankruptcy to be filed on behalf of Fiesta and a

receiver was appointed. No monies or merchandise of Fiesta were ever made available to the bankruptcy court (Tr. 1127-1128, 1516-1522).

ARGUMENT

1. Hartman, who was the government's principal witness, was originally indicted with petitioners. Just before the commencement of the trial, the prosecutor moved for and obtained (over objection) a severance of Hartman on the ground that he would testify for the government (Tr. 14, 17). Petitioners moved for a continuance before the jury was chosen (Tr. 14-17) and, later for a mistrial (Tr. 88). They stated that they had not anticipated that Hartman would testify and were therefore disadvantaged in preparation of their defense (Tr. 16, 87). It was also pointed out that Hartman's attorneys had participated in a conference of defense counsel a few minutes before the request for a severance (Tr. 15, 88). One of Hartman's attorneys stated that at the conference they discussed additional voir dire of the jury but not trial tactics (Tr. 17). The court pointed out that Hartman's attorneys would not participate in the trial of the case and asked what charge the defense was making against Hartman's counsel. The reply was "none" but that counsel might find it necessary in the interest of his client to disclose what went on at the conference (Tr. 17-18). At the renewed motion (when Hartman's lawyers were not present) counsel for petitioners said that they had discussed more than the voir dire at the conference

(Tr. 90-91). Defense counsel also represented that one of Hartman's lawyers had previously had a conversation with petitioner Freedman about the case. (Tr. 93). The prosecutor stated to the court (Tr. 94, Pet. 20):

> The Government is not in possession of any information concerning what transpired anywhere at anytime concerning these gentlemen, nor will the Government ever come into possession of anything that may be taken advantage of . . .

When the court suggested that Hartman should be insulated from any information he may have secured, the prosecutor stated that Hartman had no contact whatsoever with any of the defendants except that he had received a telephone call from Burton Wolcoff the week before. Government counsel said he would welcome the subject matter of the call coming to light if Wolcoff so desired (Tr. 94). The trial judge denied petitioners' motion, indicating that if at any time throughout the trial it appeared that the defense had been prejudiced by anything that occurred as a result of the severance he would take up petitioners' motion at that time (Tr. 92, Pet. 8).

On these facts, it is evident that petitioners were not deprived of a fair trial or the effective assistance of counsel. Hartman testified on cross-examination that he had made up his mind several months before trial to give evidence for the government and had been in contact with the government with his counsel (Tr. 453-455, 459-460). He testified unequivocally, however, that he had not, during that period, dis-

cussed the case with any of the defendants (Tr. 456). Petitioners have never even made any attempt to contradict that testimony.

Hartman did testify on cross-examination that one of the defendants had called him prior to trial and that he had reported that conversation to the government (Tr. 457-459). The court after a bench conference stated that it would permit the defense "to go into the conversation" (Tr. 458-459). Counsel stated: "I think that I made my point, your Honor." (Tr. 459). Counsel never asked the substance of the conversation. In light of Hartman's testimony that he had not discussed the case during that telephone conversation (Tr. 457), petitioners have made absolutely no showing that any information relating to the preparation of the defense came to the government through Hartman. This case is thus unlike either *Massiah* v. *United States*, 377 U.S. 201 or *Hoffa* v. *United States*, 385 U.S. 293.

With respect to the alleged participation of counsel for Hartman in the preparation of the defense, the petitioners never took advantage of the judge's ruling that if the defendants could show any prejudice "apart from the fact that a co-defendant, whom you expected to have sitting at the counsel table with you, is going to, in effect, testify for the Government", he would consider an appropriate motion (Tr. 92). Significantly, they never submitted in formal fashion the allegations made when Hartman's attorneys were not present that at the conference called prior to jury selection they discussed more than the voir dire and

that one of Hartman's attorneys had discussed the case with Freedman. Petitioners never made any attempt to challenge the statement of the prosecutor that the government had not learned and would not learn what had occurred. The court of appeals was therefore correct in holding that petitioners had made no showing that they were deprived of the effective assistance of counsel.

2. Petitioners further contend that, irrespective of the question of prejudice through communication to the government of any information concerning the case from Hartman or his lawyers, the government was required to disclose to them the fact that Hartman had determined to testify for the prosecution at trial so that preparations might better be made for their defense "under those changed circumstances" (Pet. 15). The contention is without merit. Except in a capital case (where the requirement is imposed by statute, 18 U.S.C. 3432), the government is not required to furnish the defense with a list of its witnesses. In effect, petitioners advocate an exception to that rule where the witness is a co-defendant charged in the indictment. There is, however, no reason to distinguish that situation.

Hartman testified on cross-examination that no promises had been made to him in exchange for his testimony (Tr. 340-341). Petitioners urge that the necessary implication from the fact that Hartman has never been "brought on to change his plea to guilty or to stand trial" (Pet. 25), is that his testimony as to not having been promised anything by the

government was false and that the government knew this. See *Napue* v. *Illinois*, 360 U.S. 264. The short answer is that Hartman's non-prosecution by no means shows that he was promised immunity in exchange for his testimony. It is not uncommon for a prosecutor to arrive at an independent decision, in the exercise of his discretion, not to prosecute an individual who has testified for the government.

3. Petitioner Freedman took the stand in his own defense and, during direct examination, was asked about a conversation he had had with petitioners Wolcoff in the presence of Hartman. The prosecutor requested Freedman's attorney to show how the conversation was related to the issues in the case and the trial judge thereupon directed Freedman's attorney to make an offer of proof outside the presence of the jury (Tr. 1803-1805). The offer (Tr. 1805-1806) was to the effect that on December 18 or 19, 1962, Burton Wolcoff asked Freedman to draw two checks for $10,000 each from his personal checking account, payable to an individual named Leonard Weinburg. When Freedman stated that he did not have that much money in his account, Wolcoff replied that he would "make them good" and that the money was needed for the "acquisition of another business." Thereupon Freedman drew the checks, which "bounced" when presented for certification. On learning of this, Freedman complained to petitioners that he had not been told the truth and demanded that his name be taken off the Fiesta account as the person authorized to sign checks on behalf of the company.

Counsel for petitioner Burton Wolcoff objected to the proposed testimony as prejudicial to his client. The judge excluded it, saying: "it relates to, in effect, another separate offense [not] directly connected with this matter" (Tr. 1817). The judge stated, however, (Tr. 1817-1818): "you can ask the witness whether he had some disagreement about what happened in connection with the operation of this account, but without going into detail."

During the government's case there was testimony that Freedman had been "on" the Fiesta account for about two weeks in December 1962, when he was replaced by Hartman because he (Freedman) was not "present [at Fiesta] on a full-time basis to sign the checks" (Tr. 447-449, 127-128). Petitioner Freedman contends that the ruling of the trial judge excluding the proffered evidence was error since the evidence was relevant to show his motivation for having his name removed from the Fiesta account and contradicted the government's evidence. He argues that a severance was required to protect his rights to present a complete defense (Pet. 23-24).

The argument is without substance, for the proffer did not tend to establish a defense to the charge of conspiracy, as petitioner asserts (Pet. 23). The record revealed that petitioner Freedman's involvement in the conspiracy *increased* after December 1962. Both Freedman and Hartman testified that Freedman began working regularly for Fiesta *after* Christmas of 1962, almost immediately following the incident to which the proffer related (Tr. 139-140, 1892-

1893). Freedman was aware of the plan to "scam" Fiesta, since he was present at the earlier meeting where the plan was discussed and his duties assigned (Tr. 139). Since the proffered testimony would have been highly prejudicial to Burton Wolcoff without tending to establish a defense for Freedman, the trial judge acted well within his discretion in excluding any mention of the fact that Freedman, at Burton Wolcoff's behest, drew two "bad" checks on his personal account for the purpose of buying another business. Freedman's rights were fully protected by the fact that counsel was permitted to bring out, on further examination of Freedman, the fact that Freedman has terminated his authority to sign checks for Fiesta as the result of a disagreement with petitioners (Tr. 1823-1825).

4. During presentation of the government's case the prosecutor advised the court and opposing counsel that the prosecution had subpoenaed one Handwerker; that it was aware that Handwerker had been contacted by Burton Wolcoff in connection with his defense; and that in view of those circumstances, it would "make [Handwerker] available to the defense at any time they want to talk to him for whatever purpose they want to talk to him" (Tr. 911; see also Tr. 983, Pet. 23-26). Subsequently Mr. Nasser, attorney for the Wolcoffs, asked the prosecutor whether he could see Handwerker. The prosecutor advised Mr. Nasser that Handwerker was willing to see defense counsel in government offices but that he did not wish to speak to petitioners themselves (Tr. 1086-1087). No objection was made to this arrangement.

However, the defense did not attempt to contact Handwerker during the trial. Petitioners assert that they made no effort to do so because in an "off-the-record conference the prosecutor advised the court that . . . Handwerker had been threatened; that [he] did not wish to speak to defense counsel outside the presence of a representative of the government, and that generally the witness was hostile" (Pet. 11-12).[2]

In the court of appeals petitioners filed a motion (Pet. App. 10-13) urging that court to issue an order authorizing the district court to hold a hearing during the pendency of the appeal on allegations that the government's representations regarding the hostility of Handwerker towards petitioners were false. They appended to their motion an affidavit from Handwerker (Pet. App. 14-22) stating, in substance, that he had been pressured by the government to come to Chicago; that he was interrogated about the case and

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[2] Petitioners contend (Pet. 22-23) that the Court Reporter's Act was violated by the failure to transcribe what was said at the "off-the-record conference." The record shows that the prosecutor said he would like to make a statement not in open court for reasons that would be obvious. After a lunch conference, the court said "All right. Let's get this on the record." (Tr. 910). Then followed a statement by the prosecutor which no one claimed at the time was incomplete (Tr. 911-913). Subsequently, the prosecutor informed Mr. Nasser, in the presence of all defense counsel and the court, that Handwerker did not wish to see the petitioners but would speak to their lawyers, provided the meeting took place at government offices. (Tr. 1086-1087). There is no need, therefore, as petitioners apparently urge, to remand the case for a hearing as to what was said in the unreported conference, since the substance of this conference was set forth on the record.

kept under strict supervision for five days following his arrival; and that, although ignorant of the contents of the case, he would "gladly have consented to appear on the stand with whatever questioning the defense may have put to [him]" (Pet. App. 22). Petitioners have indicated that Handwerker would have been called to testify to the bad character of the witness Hartman, with whom Handwerker had been in business (Pet. 11).

Petitioner's motion in the court of appeals was denied by Judge Fairchild (without prejudice to renewal at the time of the argument on the merits) on the ground that "the transcript shows affirmatively that government counsel made the prospective witness available for interview by defendants' trial counsel" (Pet. App. 36). The full panel did not discuss the motion, apparently believing that it did not "merit individual discussion" (Pet. App. 7).

The court of appeals was not the proper forum in which to raise for the first time a claim that statements made by the prosecutor on the record in open court were deliberately false. If petitioners thought they had a basis for a motion for a new trial, they did not need the permission of the court of appeals to make the motion under Rule 33, F. R. Crim. P.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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